SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
APR 14 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1067

In the Matter of:

W.M.R. WATCH CASE CORPORATION, a Corporation, and SHELDON PARKER, Individually and as an Officer of Said Corporation, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, W.M.R. Watch Case Corporation, a Corporation, and Sheldon Parker, Individually and as an Officer of said Corporation, by their attorney, B. Paul Noble, pray that a Writ of Certiorari issue to review the "Final Decree Affirming and Enforcing Order to Cease and Desist"[1] entered on the 11th day of March, 1965, by the United States Court of Appeals for the District of Columbia

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[1] Appendix "A". Final Decree Affirming Order to Cease and Desist.

Circuit, affirming and enforcing an Order to cease and desist by the Federal Trade Commission on March 24, 1964[2] in its Docket No. 8573.

OPINION BELOW

The opinion of the Court of Appeals[3] was entered January 14, 1965 in case number 18,670, October Term, 1964.[4] The case is not officially reported as of the date of this Petition.

JURISDICTION

The United States Court of Appeals, District of Columbia Circuit on January 14, 1965 entered its Opinion on Petition to Review a Cease and Desist Order of the Federal Trade Commission.

That Court, on March 11, 1965 entered its Final Decree Affirming and Enforcing Order to Cease and Desist.

This Court has jurisdiction pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45 (c), (g) and (h), and pursuant to 29 U.S.C.A. 254 (1) and 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the order of the Federal Trade Commission is supported by any substantial evidence that the public is deceived by petitioners' marking of the country of origin of watch cases on the inside, rather than on the outside of watch case backs?

2. Whether the Order here with respect to marking of metallic content and water repellant characteristics is frivolous, arbitrary and capricious?

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[2] Appendix "B" Decision of the Commission and Order to File Report of Compliance.

[3] Appendix "C".

[4] District of Columbia Circuit.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in the determination of the questions presented are:

The Federal Trade Commission Act:

Section 5(a), (b) 38 Stat. 719; 15 U.S.C.A. 45 (a) (b),[5] (Act of September 26, 1914, as amended).

The Lanham Trade Mark Act; 60 Stat. 433, 458, 15 U.S.C.A. 1064, 1115[6] (Act of July 5, 1946, as amended).

Administrative Bulletin 64-10.[7]

Tariff Act of 1930, as amended, 19 U.S.C.A. 1001.[8]

Trade Practice Rules for the Watch Case Industry, January 30, 1948.[9]

As provided in Rule 23(d) of this Court's Rules, the provisions above noted are printed in the Appendix to this Petition.

CONCISE STATEMENT

The jurisdiction of the Court below was founded upon Section 5 (d) of the Federal Trade Commission Act (15 U.S.C.A. 45 (b)).

The Court below affirmed an Order of the Federal Trade Commission and entered its Final Decree affirming and enforcing that Order.

Since the entry of the Order by the Agency after adversary proceedings, the Agency adopted a policy with

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[5] Appendix "D", 15 U.S.C.A. 45(a).
Appendix "E", 15 U.S.C.A. 45(b).

[6] Appendix "F", Administrative Bulletin 64-10.

[7] Appendix "G".

[8] Appendix "H".

respect to marking of country of origin which is inconsistent with the Order to Cease and Desist here.

That change of policy is reflected in Administrative Bulletin 64-10 which appears in the Appendix to this Petition.

The effect of that change of policy is to afford to competitors of Petitioners procedural advantages as well as substantive commercial rights denied Petitioners by the Order entered.

The Order of the Commission with respect to marking to indicate metallic content and water repellant characteristics is frivolous, and consequently arbitrary and capricious in that the effect of the Order will be to further confuse the public as to the nature of the case in which watches it may purchase are enclosed.

REASONS RELIED ON FOR GRANTING WRIT

1. The Court has never decided whether an Agency Order should survive administrative change of policy, as a result of which, competitors of the party against whom the Order is entered may acquire commercial advantages, if the Agency should elect to enforce that Order.

2. The Order of the Agency below as affirmed by the Court below is so frivolous as to be arbitrary and capricious in its requirements with reference to marking of metallic content and water repellant characteristics.

ARGUMENT

I.

Country of Origin

Petitioners are importers from Hong Kong, France, Japan and Switzerland. All of their watch cases are marked to indicate the country of their origin, but such markings appear on the inside of the case backs and/or case bezels.

Hence, the country of origin, though clear and apparent to petitioners' customers — watch manufacturers — would not be apparent to consumers who purchase the completely assembled watches, of which petitioners' cases are merely a component part.

The Agency concluded that this practice was false, misleading and deceptive. The Court affirmed. The following provision was included in the Final Order of the Commission.[9] They are prohibited from:

> 3. Offering for sale or selling watch cases which are in whole or in part of foreign origin, without clearly disclosing on the exterior of such cases the name of the foreign country or place of origin of such cases or parts.

Petitioners urge that the conclusion upon which the portion of the Order above quoted is based, is contrary to law and the Order provision arbitrary and capricious.

The provision can stand only if the practice is an unfair act or practice in commerce. Obviously petitioners' customers are not deceived—the country of origin is clearly disclosed to them. Accordingly, the practice is violative of Section Five only if substantial deception of consumers is inherent in the practice.

Consumers buy watches not watch cases. There is absolutely no evidence of consumer deception in this record and none from which such deception can be inferred.

Conceding that evidence of actual deception is unnecessary, nevertheless, petitioners argue that there must be evidence to support a conclusion that the practice has "a capacity or tendency" to deceive.[10]

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[9] Appendix "B".

[10] *Rayex Corp.* v. *F.T.C.* (C.A.N.Y. 1963), 317 F. 2d 290; *Colgate Palmolive Co.* v. *F.T.C.* (C.A. 1, 1962), 310 F. 2d 89.

The Tariff Act of 1930 (as amended)[11] requires that imported watch cases be marked on the inside of the back. Petitioners' cases are marked to conform with this requirement, and more. Since 1961, the inside of the bezels are marked as well as the backs.

As was pointed out so vividly in the record below, marking the case of a watch on the outside of the back will serve to confuse and deceive the public as to the origin of the actual product they may be purchasing. Movements, which are the principal ingredient of the product, are being imported from the Orient and from Europe. Many of them are assembled in the Virgin Islands and exempt from marking requirements. Manufacturers can assemble an inferior quality imported movement into a case, the back of which may be manufactured in Switzerland or the United States, and marked to so indicate. The public would then be persuaded to buy in the belief that the preferred domestic or Swiss movement is enclosed therein.

In addition, the requirement of the order provision in question creates a serious manufacturing hazard. Since cases are being imported from many different countries, all manufactured to the same specifications and all parts (backs and bezels) interchangeable, the marking on the outside of the case back, which will be the only marking visible to the consumer, may tell only half the story about the origin of the case—apart from the false inference it will give consumers about the origin of the watch itself. The Complaint pleads that the public will assume that an unmarked product is made either in the U.S.A. or Switzerland, and that the public has a preference for goods of domestic or Swiss origin.[12]

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[11] 19 U.S.C. 1001, par. 367(g), quoted above under "STATUTES, etc.".

[12] Paragraph 7, J.A. 4.

The watch case is an essential but minor component of the final product purchased by consumers. If the Commission's position is otherwise, then it had the burden of proving either that the public has an interest in the origin of watch cases, or that the case is the part of the watch which is of major interest to the consumer. There is no such evidence in the record below. It just cannot be fairly inferred, without any evidence, that a reasonable consumer would be persuaded not to buy an otherwise satisfactory watch, simply because its case was manufactured in Hong Kong or France, especially where there is no evidence that cases of those origins are inferior in quality.

In a similar case a hearing examiner of the Federal Trade Commission said:[13]

> It is difficult to believe that a reasonably minded purchaser would refuse to purchase a watch with which he was otherwise satisfied because the watch case was manufactured in a foreign country, including Hong Kong.

We urge that the watch case is merely the *carrier* of the movement and, as such, need not be marked as to country of origin except as required by the Treasury Department.[14]

Another Commission hearing examiner in an earlier case, dismissed an identical complaint; the Commission affirmed the dismissal:

> Here it is manifest that a watch case is not resold in the form in which appellants import it and that it loses its separate identity in the process of watch assembly or manufacture. There is no showing in the record here that the watch case is a substantial component

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[13] In the matter of *Savoy Watch Co., Inc., et al.*, F.T.C. Docket #8080, Initial Decision, page 13.

[14] See *Lucien* v. *Segal*, 142 F. 2d 255 and *Heller and Sons* v. *F.T.C.*, 191 F. 2d 954.

and the burden of making such a showing rested upon counsel supporting the complaint.

In still another litigated case[15] before the Commission, involving this issue, the hearing examiner dismissed the Complaint holding that watch cases are insignificant components, and that *"exterior markings of the country of origin could have a more mischievous and misleading effect on the consumer than a total non-disclosure of the country of origin on the Hong Kong made watch cases."*

On May 6, 1964, during the pendency of this appeal, the Commission circulated its Administrative Bulletin #64-10 (see Appendix F, this brief). Among other things, this expression of current Commission policy states:

> This Bulletin contains instructions which shall govern staff processing of all foreign origin matters. . . . All foreign origin matters within the jurisdiction of the Bureau of Customs 1/ shall be referred to it by the liaison officer, . . . No action shall be taken in any matter involving non disclosure of country of origin unless there is a clear and compelling probability that substantial deception and public interest are involved. . . . Among the factors to be considered . . . are: . . . In a product as to which only a component is of undisclosed origin, no action shall be taken unless such component:
>
> (1) Is a principal part or ingredient, or is a primary functional element, and
>
> (2) Is not promptly replaceable by one of like quality available in the United States.

It is manifest that petitioners' competitors are saved harmless from Commission interference with their markings of origin by virtue of the newly established policy that became effective after the Order in this case.

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[15] In the matter of: *Swiss Watch Case Corp., et al.*, F.T.C. Docket #7040. The Commission later reversed, in the matter of: *Delaware Watch Co., Inc., et al.*, F.T.C. Docket #8411, and a Court of Appeals has confirmed the Commission's Order.

II.

Treasury Dept. v. F.T.C.

Paragraph 367 (g) of the Tariff Act of 1930, as amended,[16] was effective at all times here material. It requires that the country of origin be marked on the inside of the back of imported watch cases. Obviously the order here is in conflict with that provision.

Two agencies may have concurrent jurisdiction over the same subject matter, when such dual administration does not conflict with the public interest. But where, as here, an inconsistency develops, the agency of secondary jurisdiction is collaterally estopped from assuming jurisdiction. Jurisdiction will be resolved in favor of the agency of primary jurisdiction, that is "more specific in scope" or "later in time".[17]

> Where Congress specifies an administrative remedy, such fact is normally taken to exclude any other remedy which is not specifically set forth.[18]

A court has held that where the Congress has vested jurisdiction over market operations in the Secretary of Agriculture, the Federal Trade Commission has no jurisdiction to enter orders regulating such markets.[19] The facts in that case are analogous to those here under review, insofar as the jurisdictional question is concerned. A somewhat similar jurisdictional dispute was also decided

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[16] 19 U.S.C.A. 1001 par. 367(g). See Appendix "G" this brief.

[17] *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589.

[18] *Stack* v. *N.Y. Central R. Co.*, 258 F. 2d 739. See also: *Linde Air Products Co.* v. *Johnson*, 77 F. Supp. 656 and *N.Y. Telephone Co.* v. *U.S.*, 56 F. Supp. 932, *reversed* (other grounds) 66 S.C.T. 393, 326 U.S. 638, 90 L. Ed. 371.

[19] *Chamber of Commerce of Minneapolis* v. *F.T.C.*, 13 F. 2d 473.

against the Federal Trade Commission in a conflict of authority with the Food and Drug Administration.[20]

In still another case, it has been judicially determined that the respondent agency here, in its contention for concurrent jurisdiction, was fostering a form of commercial chaos.[21]

III.

Metallic Content

The Final Order, insofar as the argument here is concerned, provides that petitioners cease and desist:

> Offering for sale or selling watch cases:
>
> (a) which are in whole or in part composed of base metal that has been treated to simulate precious metal or stainless steel, or
>
> (b) which are in whole or in part composed of base metal that has been treated with an electrolytically applied flashing or coating of precious metal of less than 1½% of one thousandths of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts the true metallic composition in a form consistent with the Trade Practice Rules for the Watch Case Industry (set forth in the Code of Federal Regulations, Title 16, Chapter 1, part 174).

Petitioners import and sell three types of cases insofar as this argument is concerned.

1. Cases that are composed of a stainless steel bezel and a stainless steel back—such cases are marked "all stainless steel". Stainless steel is not a precious metal nor has it the appearance of a precious metal. No deception is involved here.[22] All stainless steel cases are not discussed in the rules.

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[20] *Geo. F. Lee* v. *F.T.C.*, 113 F. 2d 583.

[21] *United Corp.* v. *F.T.C.*, 110 F. 2d 473.

[22] The pertinent provision of the Trade Practice Rules for the Watch Case Industry are set forth in Appendix F, this brief.

2. Cases that are composed of a stainless steel back (die stamped "stainless steel") and an electroplated bezel having a white or silver color.

3. Cases that are composed of a stainless steel back (die stamped "stainless steel") and an electroplated bezel having a yellow or gold color.

It must be conceded that if these two types of cases are marked in accordance with the rule that is the reference point in the Order, then the Order must be reversed.

The Rules provide:

Rule 2(k)(1)

Base Metal Cases Simulating Precious Metal

In respect of watch cases composed wholly of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal . . . the mark shall show that said case is base metal, as for example,

Base Metal

or

Stainless Steel

or

Nickel

or

Nickel Plated

or

etc.

It is manifest that the two types of cases are marked to conform with the quoted rule.

Paragraph (n) of the same rules provides that parts plated in the manner stipulated during the hearing shall be deemed base metal and hence the only applicable rule

is that last quoted, and the two types of cases are marked "stainless steel" as is therein provided as an alternative.

In the *Swiss Watch* case (*supra*) the Commission affirmed an examiner's dismissal of identical charges. The Commission there stated:

> The appeal of counsel supporting the complaint excepts to the hearing examiner's rulings dismissing certain charges for failure to establish a *prima facie* case. The backs of respondents' watch cases are composed of stainless steel (*as are C X 1 and 2*) and inscribed on the outside with the words "Stainless Steel Back." The cases, however, contain no markings expressly stating that the bezels are composed of base metal. Some of them are coated with chrome and others are flashed with a yellow color containing gold, which bezels allegedly simulate silver or gold in appearance. Considering that the backs are marked as stainless steel backs and not solely as stainless steel, we share in the hearing examiner's view that there has been no record showing of likelihood that purchasers buy watches encased in respondents' wares under mistaken beliefs that the bezel component likewise is stainless steel.

IV.

Water Resistant

With reference to this last argument, the Final Order provides that petitioners cease and desist:[23]

> 3. Representing, directly or by implication, that their watch cases are "water resistant" it being understood that respondents may successfully defend the use of such representation with respect to any watch case or watch, the case of which respondent can show will provide protection against water or moisture to the extent of meeting the test designated Test No. 2 of the Trade Practice Conference Rules for the Watch Industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

[23] J.A. 52.

Again, the provision of the Order here under consideration must fall, if the evidence in the record below establishes that petitioners' practices with reference to the use of this marking, which was discontinued prior to 1961,[24] were in conformity with the Order.

Conceding that all of the cases tested failed the test to which they were submitted, nevertheless, they had all met those test requirements when shipped into commerce by petitioners and were guaranteed to do so.[25]

The evidence is undisputed that the cases were tested on a spot check basis by the manufacturer, again, on the same (10%) basis, after delivery in this country, by the petitioners and again, by most of petitioners' customers. The test applied in each instance was that prescribed by the Trade Practice Rules for the Watch Industry (which is that referred to in the Order) and the cases were guaranteed to be "water resistant" in compliance with the standard required by the Commission, when so marked.[26]

The uncontradicted evidence is that if the cases did not meet the required test standard, they had either been improperly assembled or had been assembled with the wrong crowns.[27] (The several parts—backs—bezels—and crowns were shipped into commerce, in bulk and separately packed.)[28]

It is submitted that a case manufacturer can do no more to insure the water repellant characteristic imputed to a watch case by its marking, than test and guarantee—as the evidence below demonstrates the petitioners did. If properly assembled, the cases would meet the prescribed

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[24] J.A. 12, 13.

[25] J.A. 30-31.

[26] J.A. 28-32.

[27] J.A. 30-32.

[28] J.A. 35-36.

test standard. Accordingly, there is no evidence to sustain the Order and it should be reversed.

On similar evidence, the Commission has dismissed identical complaints in two other cases.[29]

CONCLUSION

Wherefore, the premises considered, petitioners pray that this Petition be granted.

Respectfully submitted,

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[29] In the matter of *Swiss Watch Case Corp.* (*supra*), and in the matter of *Theo. Kagen Corp., et al.*, F.T.C. Docket #6893.

APPENDIX A

(Filed March 11, 1965)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,670

W.M.R. WATCH CASE CORPORATION, ET AL., *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Final Decree Affirming and Enforcing Order to Cease and Desist

W.M.R. Watch Case Corporation, a corporation, and Sheldon Parker, individually and as an officer of said corporation, and Sheldon Parker, co-partner trading as W.M.R. Watch Case Company, petitioners herein, having filed in this Court on June 5, 1964, a petition to review and set aside an order to cease and desist issued against them on March 24, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of W.M.R. Watch Case Corporation, a corporation, and Sheldon Parker, individually and as an officer of said corporation, Sophia K. Cohen Huff, and Sheldon Parker, co-partners trading as W.M.R. Watch Case Company, Docket No. 8573"; and the matter having been heard by this Court on the record and briefs on December 8, 1964; and this Court having on January 14, 1965, issued its opinion and entered judgment affirming the order to cease and desist and directing that it be enforced;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED by the Court that petitioners shall forthwith comply with the aforesaid order of the Federal Trade Commission.

By the Court.

/s/ DAVID L. BAZELON
Chief Judge

/s/ HENRY W. EDGERTON
Senior Circuit Judge

/s/ GEORGE T. WASHINGTON
Circuit Judge

Entered:

APPENDIX B

Final Order

The Commission, having considered the briefs filed in the cross-appeals of respondents and complaint counsel, denies respondents' appeal and grants complaint counsel's appeal except as to respondent Sophia K. Cohen Huff.

The Commission adopts the initial decision, modifying it to include a finding that respondents' chromium-plated brass bezels may be confused with stainless steel as well as with precious metal.

In lieu of the order issued by the examiner, the Commission issues this final order.

IT IS ORDERED that respondent WMR Watch Case Corp., a corporation, and its officers, and respondents Sheldon Parker, individually and as an officer of said corporation, and Sheldon Parker, a co-partner trading as WMR Watch Case Company or under any other name or names, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watch cases, or any other mer-

chandise, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling watch cases

   (a) which are in whole or in part composed of base metal that has been treated to simulate precious metal or stainless steel, or

   (b) which are in whole or in part composed of base metal that has been treated with an electrolytically applied flashing or coating of precious metal of less than 1½ of one thousandths of an inch over all exposed surfaces after completion of all finishing operations,

   without clearly and conspicuously disclosing on such cases or parts the true metal composition in a form consistent with the Trade Practice Conference Rules for the Watch Case Industry (set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 174).

2. Offering for sale or selling watch cases which are in whole or in part of foreign origin without affirmatively disclosing the country or place of foreign origin thereof on the exterior thereof on an exposed surface or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the completed watches and of such conspicuousness as likely to be observed and read by purchasers and prospective purchasers of the completed watches.

3. Representing, directly or by implication, that their watch cases are "water resistant", it being understood that respondents may successfully defend the use of such representation with respect to any watch case or watch, the case of which respondents can

show will provide protection against water or moisture to the extent of meeting the test designated Test No. 2 of the Trade Practice Conference Rules for the Watch Industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 FR 170.2(c)).

4. Supplying to, or placing in the hands of, any dealer or other purchaser means or instrumentalities by or through which he may deceive and mislead the purchasing public in respect to practices prohibited in paragraphs one through three above.

IT IS FURTHER ORDERED that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

SEAL

/s/ JOSEPH W. SHEA,
Secretary.

ISSUED: March 24, 1964

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18670

W. M. R. WATCH CASE CORPORATION, A CORPORATION, ET AL., *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On petition for review of an order of
Federal Trade Commission

Decided January 14, 1965

Mr. B. Paul Noble for petitioners.

Mr. Lester A. Klaus, Attorney, Federal Trade Commission, of the bar of the Supreme Court of Missouri, pro hac vice, by special leave of court, with whom *Messrs. James McI. Henderson,* General Counsel, and *E. K. Elkins,* Attorney, Federal Trade Commission, were on the brief, for respondent.

Before BAZELON, Chief Judge, and EDGERTON, Senior Circuit Judge, and WASHINGTON, Circuit Judge.

BAZELON, *Chief Judge:* Petitioners are a corporate importer of foreign manufacture watchcase components, and one Sheldon Parker, who in the past has traded as a watchcase importer and now is an officer of the corporation. They challenge a Federal Trade Commission order to cease and desist from certain practices deemed unfair and deceptive. In *Delaware Watch Co.* v. *Federal Trade*

Comm'n, 332 F.2d 745 (2d Cir. 1964), the court affirmed the Commission's determination that identical practices unfairly and deceptively "failed to disclose the true metallic content of certain watchcase parts made of base metal which had been treated to simulate precious metals or stainless steel; failed to disclose the foreign origin of the watchcase parts; and misrepresented that [the] watches were 'water-resistant.' "[1] Petitioners argue that we should reach the contrary result.

With respect to the Commission findings on "true metallic content" and water resistance, petitioners urge only one ground for distinguishing *Delaware*. They claim that here, unlike *Delaware*, the conduct in question was voluntarily abandoned well before filing of the Commission's complaint. The argument, essentially, is that the matter is moot. We do not agree. Appraisal of the danger that deception may recur if not forbidden is initially for the Commission. If that danger is sufficient, there is no bar to enforcement merely because the conduct has ceased at least temporarily under the weight of the Commission's hand.[2]

With respect to the disclosure of foreign origin, petitioners attempt to distinguish *Delaware* on two grounds. The first relates to Commission instructions to its staff on May 6, 1964, shortly before the *Delaware* decision and three weeks before the petition for review in this case was filed.[3] These instructions set forth policies for deciding whether or not to prosecute cases involving putative deceptive practices relating to country of origin. It is not clear

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[1] 332 F. 2d at 746.

[2] *Sears, Roebuck & Co.* v. *Federal Trade Comm'n*, 258 Fed. 307 (7th Cir. 1919); *Spencer Gifts, Inc.* v. *Federal Trade Comm'n*, 302 F. 2d 267, 268 (3d Cir. 1962).

[3] Federal Trade Commission Administrative Bulletin 64-10. Petitioners cited this bulletin to use in their petition for review.

whether a complaint would have been brought against petitioners regarding the country-of-origin issue had these standards been in effect when the complaint was issued.[4] Petitioners claim that because they may be commercially disadvantaged if their competitors will not now be prosecuted, the order must either be vacated or remanded to the Commission for a finding whether prosecution is now warranted. But even if no prosecution would now be brought, we think the question of vacating an order already entered is for the Commission.[5] Petitioners did not seek Commission reconsideration on this issue before perfecting their appeal here and thus failed to exhaust their administrative remedies.[6]

Petitioners also contend that, unlike petitioners in *Delaware*, they must comply with a Tariff Act provision which requires permanent markings of country of origin on the inside of imported watchcases.[7] Because consumers will not see this mark, the Commission has required petitioners to affix a label (which may be temporary) to the outside of the watchcases they import. The Tariff Act require-

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[4] Petitioners, like other watchcase importers, do not disclose the country of origin of their cases in a manner likely to come to the attention of consumers. The Commission's instructions provide that country-of-origin matters involving non-disclosure (as opposed to affirmative misrepresentation) should be prosecuted only where there is a substantial public interest and—if the product (like a watchcase) is a component—where the product is a primary ingredient of the finished product, not readily replaceable by domestic goods. It is unclear whether watchcases are a primary component of watches, or are not readily replaceable by domestic substitutes.

[5] See *Moog Industries, Inc.* v. *Federal Trade Comm'n*, 355 U.S. 411 (1958); *The Regina Corp.* v. *Federal Trade Comm'n*, 322 F. 2d 765, 769 (3d Cir. 1963).

[6] *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33 (1952); *Moog Industries, Inc.* v. *Federal Trade Comm'n*, *supra*.

[7] 19 U.S.C. § 1001 par. 367(g).

ments, petitioners argue, preempt the Commission's authority. Custom officials, however, have stated that they have no objection to markings in excess of Tariff Act requirements.[8] We see no more reason to find preemption of Trade Commission authority to protect consumers from deception here than we did in *Baldwin Bracelet Corp.* v. *Federal Trade Comm'n,* 117 U.S.App.D.C. 85, 325 F.2d 1012 (1963), *cert. denied,* 377 U.S. 923 (1964), where the matter was more fully discussed.

We think the result reached by the Second Circuit in *Delaware* is sound and is required here. The Commission's order will be affirmed and its enforcement decreed.

So ordered.

APPENDIX D

15 U. S. C. A. 45(a)

Unfair methods of competition unlawful; prevention by Commission — Declaration of unlawfulness; power to prohibit unfair practices.

(a) Unfair methods of competition in commerce, and unfair, or deceptive acts or practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

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[8] The Bureau of Customs of the Treasury Department so informed petitioner and the Commission during the instant proceedings. Letter from W. E. Higman, Deputy Commissioner of the Bureau of Customs, Commission Exhibit No. 14A.

APPENDIX E

15 U. S. C. A. 45(b)

PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS

(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or if a petition for review has been filed within such time then until the transcript of the

record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such a manner as it shall deem proper, modify or set aside in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require; *Provided, however,* that the said person, partnership or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

APPENDIX F

FEDERAL TRADE COMMISSION
WASHINGTON

May 6, 1964.

ADMINISTRATIVE BULLETIN 64-10

Subject: Foreign Origin Matters.

Purpose and Scope

1. This Bulletin contains instructions which shall govern staff processing of all foreign origin matters.

A. These instructions shall control all actions of the operating Bureaus of Deceptive Practices and Industry Guidance and all advisory functions of the Bureau of Economics.

B. There shall be cooperation and consultation at all times among the three Bureaus to achieve uniform compliance with these instructions.

Definition

2. Foreign origin matters involve:

A. Affirmative misrepresentation of the country or place of origin of a product or its components; and

B. Failure to disclose the foreign country or place of origin of a product or its components.

Customs Matters

3. All foreign origin matters within the jurisdiction of the Bureau of Customs[1] shall be referred to it by the liaison officer[2] unless he believes that the Bureau's remedy would be inadequate *and* that the matter meets the criteria of paragraphs 4 or 5 below.

A. When the liaison officer believes that the Commission should retain jurisdiction he shall make a report and recommendation to the Commission, and no action shall be taken unless ordered by the Commission.

Other Foreign Origin Matters

4. Country-of-origin matters involving affirmative misrepresentation of country of origin are to be treated like other deceptive-practice matters.

5. No action shall be taken in any matter involving nondisclosure of country of origin unless there is a clear and

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[1] 19 U.S.C. 1304.

[2] Pursuant to appointment by the Executive Director dated August 16, 1961, James A. Murray, Assistant Director of the Bureau of Deceptive Practices, is liaison officer with the Bureau of Customs.

compelling probability that substantial deception and public interest are involved.

A. Among the factors to be considered in evaluating the substantiality of the public interest are:

(1) The volume of interstate sales of the product;

(2) The relative importance of the product to consumers;

(3) The significance to the public of the deception; and

(4) Whether nondisclosure of country of origin is an industry-wide practice, or respondent's nondisclosure has caused substantial diversion of business from competitors.

B. In a matter involving a product as to which only a component is of undisclosed foreign origin, no action shall be taken unless such component;

(1) Is a principal part or ingredient, or is a primary functional element; and

(2) Is not promptly replaceable by one of like quality available in the United States.

C. In a matter involving nondisclosure of foreign origin in an advertisement, no action shall be taken unless ordered by the Commission.

D. Country-of-origin nondisclosure matters shall be accorded low priority.

Additional Considerations

6. Upon determination by the liaison officer that any action in connection with any foreign origin matter may be in conflict with the foreign trade or any other policy of the United States, he shall make a report and recommendation

to the Commission; and no such action shall be taken unless ordered by the Commission.

Corrective Action

7. No complaint shall be forwarded for issuance by the Commission unless settlement by administrative treatment or other voluntary procedure has been considered and found to be either clearly inappropriate or ineffectual, which finding shall be set forth and supported in the forwarding memorandum.

By direction of the Commission.

/s/ JOHN N. WHEELOCK
John N. Wheelock,
Executive Director.

DISTRIBUTION: Professional Staff

APPENDIX G

The Tariff Act of 1930 (as amended), 19 U.S.C.A. 1001

Paragraph 367(g). Any of the foregoing cases (watch cases imported), containers or housings, shall have cut, engraved, or die sunk, conspicuously and indelibly on the inside of the back cover, the name in full of the manufacturer or purchaser and the name of the country of manufacture.

APPENDIX H

Trade Practice Rules for the Watch Case Industry

(promulgated by the Federal Trade Commission, January 30, 1948)

Rule 2, pages 8 and 9. In respect to watch cases composed wholly of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal, . . . the mark should show that the case is base metal, as for example

Base Metal

or

Stainless Steel

(n) *Marking Of Minimum Quality, In Lieu Of Multiple Stamping.* In respect of watch cases in which the case itself has parts which are plated or coated with different thickness of plating or electroplating . . . such watch cases may be marked with the quality and fineness of the lowest grade as an optional method in lieu of marking each such different piece or part, . . . (. . . If such plating or electroplating is of an alloy . . . the part of the case so constructed shall be deemed base metal).

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1067

W. M. R. WATCH CASE CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 5a-8a) and the opinion and order of the Federal Trade Commission (App. 46-53)[1] have not been officially reported.

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[1] "App." refers to the joint appendix filed by petitioners in the court below.

JURISDICTION

The decree of the court of appeals denying the petition to review and enforcing the Commission's order was entered on March 11, 1965 (Pet. 1a-2a). The petition for a writ of certiorari was filed on April 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the Commission's cease and desist order properly (1) requires petitioners to mark the foreign country of origin of watch cases imported by them on the outside—rather than the inside—of the watch cases; (2) requires petitioners to disclose the true metallic content of their watch cases; and (3) prohibits petitioners from misrepresenting that their watch cases are "water resistant."

STATUTES AND RULES INVOLVED

Pertinent provisions of the Federal Trade Commission Act, and of the Tariff Act of 1930, are set forth at pages 8-10a, 13a of the petition for certiorari.

Rule 174.2(b)(12) of the Trade Practice Rules for the Watch Case Industry, 16 C.F.R. 174.2(b)(12) is set forth in part in the petition, page 14a. Also pertinent is subparagraph (b)(13) of those Rules, 16 C.F.R. 174.2(b)(13), which provides in part:

> *Cases having a combination of different metals.* In respect of watch cases having a back and bezel composed, respectively, of a different kind or

quality of metal, the disclosure for marking . . . shall be made . . . with respect to each such respective parts, as for example:

> Base Metal Back 14K Gold Filled Bezel [To be shown together or at one place on the case].

When two or more parts of the case do not have the appearance of being made of the same quality or kind of metal, as for example, when the bezel . . . is of gold filled quality and the back is stainless steel, the marking . . . may be separated as illustrated . . .:

> Stainless Steel [Placed on the back]. 14K Gold Filled [Placed on the bezel].

* * * *

STATEMENT

Petitioners, a New York Corporation and its president, manufacture and import watch cases—backs and bezels [2]—from Europe and the Orient (App. 11-13). They sell the cases to watch manufacturers, who assemble and encase watch movements therein and resell the completed product to the public (App. 33).

The Federal Trade Commission instituted proceedings against petitioners in May 1963. The complaint (App. 1-4) charged that by (1) failing to disclose the name of the foreign country of origin on the outside of the watch cases, (2) failing to reveal the true metal composition of the bezels, and (3) representing that their watches were "water resistant", petitioners

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[2] The bezel of a watch is the grooved rim that holds the crystal on a watch.

engaged in unfair methods of competition and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Testimony before the Commission examiner revealed that petitioners mark the name of the foreign country of origin on the inside of both the case backs and bezels, but after the watch parts are assembled, the country's identity is no longer visible to the consumer (App. 23-24). Watch manufacturers frequently assemble petitioners' cases with movements imported from Switzerland, in which case the dials bear the word "Swiss" (App. 33-34). The examiner found that where the watch cases are imported from countries other than Switzerland the absence of visible disclosure of this fact misleads the public by causing them to understand that the cases are either of domestic or Swiss origin (App. 49). Second, many of the bezels sold by petitioners are electrolytically finished in a color simulating precious metal (silver or gold) or stainless steel; the true metallic content of the base metal (brass, which is chromium-nickel plated or gold-electroplated) is not disclosed (App. 13, 16, 19-20). The examiner found this lack of disclosure to be deceptive (App. 48). Finally, the examiner found deceptive petitioners' representations that certain of their watch cases were "water resistant" (App. 48), it having been demonstrated that several of the cases failed water resistance laboratory tests recognized by petitioners to have been properly conducted (App. 20-21).

The Commission adopted the examiner's initial decision, with a modification, and entered a final order directing petitioners to cease and desist selling watch

cases (1) of foreign origin without disclosing the identity of the foreign country on the exterior of the case, (2) treated to simulate precious metal or stainless steel without disclosing the true metallic content of the case and (3) with the representation that the cases are "water resistant" unless they meet the Commission's test (App. 51-53). The court of appeals affirmed the Commission's order, noting that the practices here were identical to those recently found by the Second Circuit to be unfair and deceptive (Pet. 5a-7a).[3]

ARGUMENT

The acts and practices cited by the Commission are admitted by petitioners, and the court of appeals correctly held that the Commission was well within its discretion in concluding that such practices were deceptive and misleading, and in prohibiting them. Further review is not warranted.

1. Petitioners' principal complaint is that the Commission's order requiring them to mark the name of the foreign country of origin on the exterior of their watch cases (a) would confuse the public, (b) places them at a competitive disadvantage and (c) conflicts with a provision of the Tariff Act of 1930, as amended, 19 U.S.C. 1001 (Pet. 8-10). Their contentions were correctly rejected by the court of appeals (Pet. 7a-8a).

(a) Petitioners contend that noting the foreign country of origin on the exterior of watch cases is

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[3] *Delaware Watch Co.* v. *Federal Trade Commission*, 332 F. 2d 745 (C.A. 2).

not needed to protect the watch manufacturers and would confuse the public by implying that the indicated origin was the source of the movements, the principal part of the watches (Pet. 6). However, it is not difficult to indicate the origin of the back by an appropriate notice which will avoid a new misrepresentation about the watch movements; indeed, the Commission occasionally requires separate notices with regard to back and bezel (*infra*, p. 8). The Commission found, moreover, that the public prefers cases of domestic or Swiss origin and would be deceived in the absence of external disclosure of the origins of the cases (J.A. 49). These findings, which are identical to those affirmed by the Second Circuit in *Delaware Watch Co.* v. *Federal Trade Commission*, 332 F. 2d 745 (C.A. 2), fully support the order.

(b) Petitioners place unwarranted reliance upon the Federal Trade Commission Administrative Bulletin 64-10 issued after the entry of the order in this case, which they view as indicating a change in Commission policy relating to nondisclosure of foreign country of origin. The court of appeals correctly held that the bulletin merely sets forth certain guide lines to be followed by the Commission's staff in deciding whether or not to prosecute future cases involving deceptive practices in this area (Pet. 6a),[4] and that

[4] The F.T.C. bulletin (Pet. 10a-13a) provides essentially that cases involving non-disclosure of foreign country of origin should be prosecuted where there is a substantial public interest and the product is a primary ingredient of the finished article, not readily replaceable by domestic goods.

the agency's judgment in not proceeding against petitioners' competitors is no basis for reversing the order here. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411. In any event, the Commission has continued to prosecute proceedings against importers of watch cases charging deceptive practices identical to those alleged here.[5]

(c) The court of appeals correctly rejected petitioners' contention that the Tariff Act provision requiring markings of foreign country of origin on the inside of imported watch cases preempts Commission authority to require external markings (Pet. 7a-8a). The Federal Trade Commission Act is a broad statute forbidding unfair or deceptive acts or practices, whereas the Tariff Act of 1930, as amended in 1938, 19 U.S.C. 1001, is a limited statute on an entirely different subject—the conditions under which foreign goods shall enter the United States—and is "aimed at the collection of duties rather than the protection of the ultimate purchaser in the United States," *United States* v. *Mersky*, 361 U.S. 431, 440. The Tariff Act "discloses no language expressing an intention on the part of Congress to repeal Section 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices," *L. Heller & Son* v. *Federal Trade Commission*, 191 F. 2d 954, 957 (C.A. 7). In view of their different objectives, both the Treasury Department and the Commission have jurisdiction to regulate the marking of foreign origin articles, *Bald-*

[5] *E.g. Detra Watch Case Corp.*, Docket 8597; *Savoy Watch Case Co.*, Docket 8080.

win Bracelet Corporation v. *Federal Trade Commission*, 325 F. 2d 1012 (C.A.D.C.), certiorari denied, 377 U.S. 923.

2. Petitioners contest neither the Commission finding that their base metal bezels could be mistaken for precious metals nor its findings that absence of an affirmative disclosure of the true metallic composition of the bezels is deceptive (App. 47-48), *Theo. Kagen Corp.* v. *Federal Trade Commission*, 283 F. 2d 371 (C.A.D.C.), certiorari denied, 365 U.S. 843. They urge, however, (Pet. 10-12) that, by stamping "stainless steel" on the backs of cases composed of a combination stainless steel back and electroplated bezel (white or silver, yellow or gold in color), they are already complying with Rule 174.2(b)(12) of the Commission's Trade Practice Rules for the Watch Case Industry and that the Commission's order requiring additional disclosure is therefore unwarranted. However, reliance on that Rule, which concerns cases wholly composed of one metal, is misplaced. The order relates to petitioners' cases composed of more than one metal—in which the back is stainless steel but the bezel is brass, plated with chromium-nickel or gold. Rule 174.2(b)(13) (*supra*, pp. 2-3) requires watch "[c]ases having a combination of different metals" to be marked with the metal content of both back and bezel.

3. Petitioners concede that the water resistance tests were properly conducted by the Commission and that the results established that none of the watch cases tested was in fact water resistant. The contention that the negative test results were attributa-

ble to the manufacturers' assembling the cases with improper crowns supplied by others (Pet. 13) is contrary to petitioners' stipulation before the Commission that the watch cases tested contained crowns supplied by petitioner W. M. R. itself (App. 22). The Commission's order prohibiting them from making incorrect representations in this regard was clearly proper.

CONCLUSION

The decision of the court below is plainly correct and presents no important question of law warranting further review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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May 1965.

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